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Judgment: approved by the Court for handing down | *Delivered:* **23/03/11**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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IN THE MATTER OF THE TRUSTS OF THE PRESBYTERIAN CHURCH IN IRELAND

-and-

IN THE MATTER OF THE CHARITIES ACT (NI) 1964

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BETWEEN:

THE TRUSTEES OF THE PRESBYTERIAN CHURCH IN IRELAND

Plaintiff;

-and-

HER MAJESTY'S ATTORNEY GENERAL FOR NORTHERN IRELAND

Defendant.

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DEENY J

[1] In this Summons brought by the plaintiff, the Trustees of the Presbyterian Church in Ireland ("the Church") seek authority from the court to make an ex gratia contribution of up to £1,000,000 from its unrestricted charitable funds to an access fund which is being proposed as part of the Government's "rescue package" in respect of the Presbyterian Mutual Society (In Administration) ("the Society"). Ms Sheena Grattan appeared for the Trustees. The defendant to the action is Her Majesty's Attorney General for Northern Ireland who is represented by Ms Denise McBride of counsel. She confirmed to the court that the Attorney's role in this matter was confined to his role as a custodian of the public interest in regard to charities and not in his capacity as advisor to the Northern Ireland Executive.

[2] The plaintiff had asked for this matter to be listed for early hearing before the court as an urgent decision was required to facilitate the creation of the access fund prior to the adjournment of the Assembly on 24 March. The court was told at the hearing on 9 March that the General Board of the Presbyterian Church was actually meeting the next day 10 March and were anxious to have a judgment by then. This is far from ideal. The court has been able to facilitate this request by announcing it's ruling on 10 March. These are the underlying reasons.

[3] It is necessary, for present purposes, to recall the factual background to this application. The Presbyterian Mutual Society Limited received monies by way of investments or loans akin to deposits from persons, largely in Northern Ireland. It was not, but might have been mistaken for, a building society. Rather it was a Society governed by the provisions of the Industrial and Provident Societies Act (NI) 1969. This meant that it was not covered by Government guarantees extending to banks and similar institutions when there was a run on such institutions after they had lost the confidence of the public. The Society went into administration on 17 November 2008.

[4] By the Rules of the Society the persons who invested up to £20,000 in the Society were credited with shares in the Society. Indeed that was the maximum shareholding. Sums invested over and above that level, attracted by the interest rates which the Society paid, were treated as loan capital to the Society. This had an unintended effect that these different investments, without the original investors very largely being aware of it, had a very different status in law once it became apparent that the Society would be unable to recover all its loans. While loans had been extended to Presbyterian congregations, individuals and various enterprises who had owned or acquired buildings paying a secure rent, much of the Society's money had gone to developers on schemes which proved speculative and currently worth less in aggregate than the monies advanced. As I had to conclude in Boyd v Howie [2010] NI Ch 2 the shareholders could not be creditors in law and therefore the Administrator was not enabled to distribute a dividend he had accumulated to them. Furthermore they could only ever recover after the loan capital holders were repaid in full, which was regarded as an unlikely scenario.

[5] It was subsequently indicated that public money might be available from both the Northern Ireland budget and the general body of taxpayers in the United Kingdom through HM Government to assist the investors. A contribution was sought from the Presbyterian Church in Ireland.

[6] The Presbyterian Church in Ireland had no legal responsibility for the Presbyterian Mutual Society Limited. That is clear. But I accept the averments of Rev Dr Donald Watts, Clerk of the General Assembly and General Secretary of the Presbyterian Church in Ireland that this distinction

was not apparent to very many members of the Church. They tended to consider the Church responsible for the Society.

[7] "Enormous pressure" was put on Moderators, in succession, of the Church and others such as himself because of, in particular, the hardship which many persons were suffering because they had committed their modest life savings solely to the Presbyterian Mutual Society. They were in the very unhappy position that they could not gain access to these modest savings, even for their day-to-day living. Furthermore there was virtually no prospect of them ever doing so given the state of the Society.

[8] It is important to bear in mind, as I pointed out in my earlier judgment, what the membership of the Society was. This was governed by Rule 4 of the Rules. It reads as follows:

> "Membership shall only be available to members of the Presbyterian Church in Ireland over the age of 18 years and their families together with officers and employees of the Society but the Board of Directors of the Society, (hereinafter referred to as 'the Board'), has the absolute right to refuse any application for membership without having to furnish any reason for the refusal. Any Corporation or unincorporated body shall be admitted to membership if the Board is satisfied that the Corporation is representative of members of the Presbyterian Church in Ireland."

Therefore the perception that the Presbyterian Church owed a moral obligation for the Society is not only a matter of nomenclature or encouragement to invest but also because members of the Society <u>had to be Presbyterians</u>.

[9] As appears from the first affidavit of Dr Watts, sworn on 22 February 2011, a Special General Assembly of the Church was convened on 13 April 2010. The Special General Assembly passed a resolution to contribute £1m towards a hardship fund. I set out the resolution which was apparently passed unanimously by the General Assembly:

> "That in the event of the Government failing to secure a 'commercial' solution and the Northern Ireland Executive bringing forward a final comprehensive proposal which includes a 'Hardship' Fund element, the General Assembly agree in principle to contribute £1m while affirming their view that the members of the PMS are thrifty savers and not risk taking investors."

[10] While looking at these minutes of the General Assembly it is interesting to note that immediately prior to this resolution the Assembly also recorded, inter alia:

> "That the General Assembly welcomed the commitment of the Prime Minister (Mr Gordon Brown) to seeking a resolution of the PMS crisis and his acknowledgment of <u>a moral obligation</u> to do so."

[11] It is common case that the use of the monies held by the Church to relieve the poverty of its individual members who happened to be small investors in the Society and were now suffering hardship as a result would be charitable in nature for that reason.

[12] However, in the events that have transpired the proposal emanating from Government is wider in nature. It has been described by the Minister for Enterprise, Trade and Investment in her letter of 26 January 2011 to Dr Watts as a "mutual access fund". The Minister acknowledges, and I am informed by counsel now, that the final details of the scheme are not in the public domain and are indeed not fixed. However what can be said is that the fund would consist of the £1m from the Presbyterian Church (subject to the approval of the court), some £25m from the Government of the United Kingdom and a further £25m from the Northern Ireland Executive. The administrator of the Presbyterian Mutual Society is confident that this would give a high return for small savers. These grants are coupled with the offer of a loan from the Government of the United Kingdom of a further £175m. The effect of this in combination with the grants just mentioned would be to also substantially recompense the loan capital holders who are creditors of the Society.

[13] The difficulty for the Church is that as its money could not be identifiably only used for the relief of poverty it would not in law be a charitable disposition which it was entitled to make without more. It is common case that if the legal test to which I shall turn in a moment had in the view of the Attorney General for Northern Ireland been met he could have authorised this expenditure. He was empowered to but he thought it "preferential" (ie. preferable) to put the matter before the court. I have considered not only the written submissions of Ms Grattan but the written submissions of Mr Larkin QC and Ms McBride and the oral submissions of both junior counsel.

[14] The general principle is that a charity is not allowed to make disbursements for non-charitable purposes. That would be inconsistent with the purpose for which the charity was set up. Furthermore it would be an abuse of the privileged position in tax which a charity can enjoy. However in

Re Snowden Deceased (1970) Ch. 700 the High Court was invited to consider whether there was an exception to this general rule. It is interesting to note the submissions of NCH Browne-Wilkinson QC, as he then was, counsel for the Attorney General at page 706:

> "It has been a long established view that the Attorney-General has no power to authorise application of the funds of a charity for non-charitable purposes. This precise problem has been put to counsel for the Attorney-General for over 40-50 years. Each counsel has treated it as clear law. In the present case the point of moral obligation has been raised. The Attorney-General thinks there is something wrong if a charity cannot given effect to a 'moral claim'" [in appropriate cases].

[15] In the event Cross J, as then he was, was persuaded that a moral obligation, in that case in relation to wills, could ground such an exception to the general rule. He said, at page 710:

> "In the result I am satisfied that the court and the Attorney-General have power to give authority to charity trustees to make ex gratia payments out of funds held in charitable trusts. It is, however, a power which is not to be exercised lightly or on slender grounds but only in cases where it can be fairly said that if the charity were an individual it would be morally wrong of him to refuse to make the payment."

[16] It was suggested on behalf of the Attorney that this was a high hurdle for the plaintiff here to meet but I prefer to content myself with the actual language of Cross J with which I agree. It is common case that the principle is one that has wider application for charities and is not confined to the facts of the particular cases before Cross J.

[17] A further case referred to by counsel was Attorney General v Trustees of the British Museum [2005] Ch. 397, a decision of Sir Andrew Morritt V-C. In that case the British Museum had acquired four old Master drawings after the Second World War. It was established to the satisfaction of the Trustees by the heirs of Dr Feldmann that they had been seized from Dr Feldmann by the Nazis in occupation of Czechoslovakia after the invasion of that country by Germany and because he was Jewish. Therefore the Trustees felt morally obliged to address the claim of the heirs. However, they were bound by the provisions of Section 3 of the British Museum Act 1963 which prohibited the disposal of objects in the museum's collections, save for certain exceptions

which were not applicable. The judgment of the Vice Chancellor includes the following:

> "[46] In the case of the Benevento Missal the Spoliation Advisory Panel concluded that restitution by the Trustees of the British Library was barred by Section 3(5) of the British Library Act 1972 applying Section 3(4) of the British Museum Act 1963. In the report dated 23 March 2005 (HC 406), at para. 77, the Panel under the chairmanship of Sir David Hirst, recommended to the Secretary of State that legislation should be introduced to amend the British Museum Act 1963, British Library Act 1972 and the Museums and Galleries Act 1992 so as to permit restitution of cultural objects of which possession was lost during the Nazi era (1933-1945). The Panel also recognised the possibility that legislation might relate to a specific object or objects. I have, in fact, reached the same conclusion. In my judgment only legislation or a bona fide compromise of a claim of the heirs of Dr Feldmann to be entitled to the four drawings could entitle the Trustees to transfer any of them to those heirs."

[18] As it happens I have the honour to serve as a member of the Spoliation Advisory Panel under the wise and distinguished chairmanship of The Rt Hon Sir David Hirst, a former Lord Justice of Appeal. I am happy to find that my view has not changed from the view collectively expressed in that report and that it has been approbated by the Vice Chancellor. It is relevant to my jurisdiction here in that it might well have been the case that the role of the court was affected by the provisions of the Charities Act (NI) 2008 which came into force in Northern Ireland on 18 February of this year. If the provisions of the statute had expressly substituted the role of the Charity Commission for that of the court it would not have been open to me to deal with the application of the plaintiffs here. In the absence of such an express provision I accept the submissions of counsel that the application is properly brought before the court.

[19] The attention of the court has been drawn to the briefing note regarding the mutual access fund which accompanied the Minister's letter of 26 January 2011. From that one learns that "there has been extensive opposition from PMS members to the use of means testing and lobbying that the fund should operate on a formula basis and Ministers are now prepared to adopt this approach." It is the absence of means testing which deprives the gift of the sum of £1m of its charitable character.

[20] What is a moral obligation? The industry of counsel did not discover any accepted definition. It might be said that a person or organisation is under a moral obligation to act in a particular way towards another not by reason of law or force but because, on account of some earlier promise or the relationship with that other person or some other reason, their own conscience or that of right thinking people generally would consider they behaved honourably and well if they acted in that way but badly and wrongly if they failed or neglected so to do. How would that apply here? In his affidavits Dr Watts gave a few moving examples of the hurt felt by some of these small savers deprived of an investment, modest by some standards but substantial to them. These people will benefit by the scheme proposed to a considerable extent. If the Church does not contribute it may well be that the scheme does not proceed and therefore the persons exposed to poverty will not be assisted. By operation of law and the realities of the state of the Society it is extremely unlikely that they would receive any of their money back without such external assistance.

[21] It is interesting to note that the resolution of 2010 referred to the gift going to a solution which included a hardship fund i.e. that it would not be exclusively for those in hardship. I bear in mind that any saver who finds themselves deprived of money which they had invested in an apparently reputable financial institution in the United Kingdom may be aggrieved to find themselves deprived of it when others in apparently similar circumstances have been compensated or indemnified.

[22] Perhaps the matter goes further. It can be seen that the contribution of the Church is a modest one compared to the contribution to be made by taxpayers in Northern Ireland and throughout the United Kingdom. It would be paradoxical if the general body of taxpayers consisting of Anglicans, Catholics, atheists, agnostics, Moslems and Jews (as well as Presbyterians and many others) contributed to this solution but the only Church to which the members of the Society could belong did not make any contribution. I am satisfied that Dr Watts' apprehension that the Presbyterian Church would be considered very widely to have acted badly in such circumstances is a correct one. I am satisfied that the surrounding circumstances, including in particular the promise previously given by this resolution, constitute a moral obligation on the Church which enables and allows the court to authorise the payment of up to £1m towards this mutual assistance fund.

[23] As indicated above, as it happens the Charities Act has come into force within the last month. As the Commission was only in the process of being set up and the Attorney General had previously been applied to it is quite understandable that the plaintiffs continued with their application to the High Court. The court has been able to give them an expeditious hearing of their application. I have decided this matter on the basis that moral

obligation does exist here. However for the avoidance of doubt I find that it would be proper for me to take into account the most recent statutory enactment on the topic. The relevant provision is Section 46(1) of the Act of 2008. It reads:

> "Subject to the provisions of this Section, where it appears to the Commission that any action proposed or contemplated in the administration of a charity is expedient in the interest of the charity, the Commission may by order sanction that action, whether or not it will otherwise be within the powers exercisable by the charity trustees in the administration of the charity; and anything done under the authority of such an order shall be deemed to be properly done in the exercise of those powers."

[24] Both counsel submit that expedient means something more than convenient. Ms McBride referred to the guidelines published by the Charity Commission in England and Wales at page 132 of these papers as follows:

> "Expedient means something more than 'convenient' and means that there must be a definite advantage to the charity."

Without dissenting from that I would be inclined to think that the language of Cross J was applicable to a decision to be made in this regard ie. that the power was one "not to be exercised lightly or on slender grounds". It may well be that the intentions expressed in any original Trust or other instrument establishing the charity would have to be very carefully taken into account. The expenditure must be expedient in the interests of the charity, not those of its trustees or employees.

[25] It is not for me to usurp any future decision of the Commission and I do not so do, although their decisions are likely to be subject to judicial review. Suffice it to say that I am satisfied that this new statutory test would be one which the plaintiffs here could meet consistently with the decision at which I have arrived. I take into account that there is a loss to the funds of the charity i.e. the Church by the disbursement of this money but that the disbursement will lead to very considerable benefit to a considerable number of members of the Church and thereby in both the reputational and in all likelihood financial sense to the Church itself, bearing in mind Dr Watts' report of some diminution in contributions which may be caused not by the current economic difficulties but by the controversy over the Presbyterian Mutual Society. It is in the broader interests of the Church.

[26] I therefore grant to the Trustees of the Presbyterian Church in Ireland the authority they seek pursuant to this summons to make an ex gratia contribution of up to £1,000,000 from their unrestricted charitable funds to the mutual access fund which is proposed to assist the investors, whether shareholders or creditors in law, in the Presbyterian Mutual Society Limited (In Administration).